

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

**FILED**  
December 6, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

ANTONIO KENDRICK, )  
 )  
Appellant, )  
 )  
VS. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

C.C.A. NO. W1999-01789-CCA-1-99C  
SHELBY COUNTY  
HON. JOHN P. COLTON, JR.,  
JUDGE  
(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant, Antonio Kendrick, was convicted of rape by a Shelby County Criminal Court jury. The trial court sentenced him as a Range I standard offender to ten years incarceration. On November 5, 1997, this Court affirmed the Defendant's conviction on direct appeal, and the Tennessee Supreme Court denied permission to appeal on July 13, 1998.<sup>1</sup>

The Defendant filed a pro se petition for post-conviction relief on August 10, 1998, arguing that he was denied his constitutional right to trial by jury because the trial court failed to instruct the jury on certain lesser included offenses. On September 9, 1998, the trial court denied the petition, stating that the issue raised by the Defendant in his petition had been waived for failure to present it on direct appeal. On September 25, 1998, the Defendant filed a pro se "Motion to Reconsider and Affidavit [sic] in Support of Motion to Reconsider and/or Motion to Allow Defendant to File an Amended Petition for Post-Conviction Relief," in which he alleged ineffective assistance of counsel on direct appeal and requested appointment of counsel to aid him in amending his petition for post-conviction relief. The trial court denied the motion to reconsider on November 6, 1998, finding that the Defendant's petition did not allege any grounds upon which relief could be given. On November 30, 1998, the Defendant filed a motion for appointment of counsel on appeal, which was granted by the trial court on January 21, 1999.

The Defendant, through counsel, now appeals the trial court's dismissal of his petition. He presents only one issue for our review: whether the trial court properly dismissed the Defendant's petition for post-conviction relief without the appointment of counsel. Having considered the parties' briefs in addition to the

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1. State v. Antonio Kendrick, No. 02-C-01-9604-CR00121, 1997 WL 686266 (Tenn. Crim. App., Jackson, Nov. 5, 1997).

law and having thoroughly reviewed the record in this case, we affirm the action of the post-conviction court.

*Petition for Post-Conviction Relief*

The new Post-Conviction Procedure Act governs this petition and all petitions filed after May 10, 1995. See Tenn. Code Ann. §§ 40-30-201 to -310. The act provides that a trial court must consider a petition within thirty days of its filing and “examine it together with all the files, records, transcripts, and correspondence relating to the judgment under attack.” Tenn. Code Ann. § 40-30-206(a). The prescribed form for petitions requires that grounds for relief must be specified and that a petitioner must set out the facts to establish a “colorable claim.” See Tenn. Sup. Ct. R. 28, § 5(E); see also id. § 6(B)(2)-(3). A colorable claim is one “that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.” Tenn. Sup. Ct. R. 28, § 2(H).

A petitioner must allege facts to show that claims have not been waived or previously determined. Tenn. Code Ann. § 40-30-204(e). Tennessee Code Annotated § 40-30-206(g) provides as follows:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-206(g). “If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court’s conclusions of law.” Tenn. Code Ann. § 40-30-206(f). The grounds for relief relied upon in the Defendant’s petition for post-

conviction relief could clearly have been raised on direct appeal. The failure to do so results in a waiver of these grounds, as the trial judge correctly ruled.

The Defendant relies upon rule 28 of the Rules of the Supreme Court to argue that his pro se petition should not have been dismissed prior to appointment of counsel. Specifically, he points to the following section: “No pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel.” Tenn. Sup. Ct. R. 28, § 6(B)(4)(b) (emphasis added). The section of Tennessee Code Annotated addressing preliminary consideration of a post-conviction petition states,

The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

Tenn. Code Ann. § 40-30-206(d).

In this case, the trial court did not dismiss the Defendant’s pro se petition for failure to follow the prescribed form. The Defendant presented a clear and specific statement of the ground upon which he believed relief should be granted, and he presented facts in support of his ground for relief. However, the trial court dismissed the Defendant’s petition on the basis of waiver.

As previously stated, barring two specific exceptions, see id. § 40-30-206(g)(1)-(2), a ground for relief is deemed waived if a petitioner “personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Tenn. Code Ann. § 40-30-206(g). “Almost any ground for relief, except

ineffective assistance of counsel, could be raised during trial, and failure to do so will be deemed a waiver.” Blair v. State, 969 S.W.2d 423, 425 (Tenn. Crim. App. 1997); see also Johnny Wayne Harris v. State, No. 03C01-9803-CR-00086, 1999 WL 2839, at \*2 (Tenn. Crim. App., Knoxville, Jan. 6, 1999). When a trial court determines that a petitioner has not presented a colorable claim or that a claim has been waived, the trial court may, in its discretion, summarily dismiss the petition without the appointment of counsel. Id.; see Tenn. Sup. Ct. R. 28, § 5(F)(4) (stating that “[a] petition may be dismissed without a hearing if it . . . does not state the reasons that the claim is not . . . waived”). We conclude that the trial judge did not err by summarily dismissing the petition.

#### *Motion to Reconsider*

In his motion to reconsider, filed some two weeks after the petition was dismissed, the Defendant alleged ineffective assistance of counsel at trial. The trial court denied the motion on the basis that the Defendant’s petition for post-conviction relief did not allege any grounds upon which relief could be granted.

Although there are no rules in our state addressing motions to reconsider decisions of trial courts, Woods v. State, No. 01C01-9606-CR-00238, 1997 WL 602865 (Tenn. Crim. App., Nashville, Sept. 30, 1997), we do not believe that it was improper for the Defendant to file such a motion in this case. However, even though a trial judge is not prohibited from considering such a motion, the judge is under no obligation to do so. The filing of a motion to reconsider does not effect the time at which the judgment becomes final or the time within which to file a notice of appeal. See Sherman McDowell v. State, No. 62, 1991 WL 139727 (Tenn. Crim. App., Jackson, July 31, 1991). We conclude that the trial court did not err by “dismissing” the motion to reconsider his dismissal of the post conviction petition.

In effect, after the trial court entered its order denying the Defendant's petition for post-conviction relief, the Defendant sought through his motion to be allowed to amend his petition or to be granted relief based on grounds not raised in his petition. Specifically, in his motion to reconsider he claims that he received ineffective assistance of counsel on direct appeal. He also argues that he did not knowingly and understandingly waive the issue which he raised in his petition for post-conviction relief, namely the trial court's failure to instruct the jury on certain lesser included offenses, and he contends that his attorney was ineffective "for not having raised the issue previously."

We conclude that this claim is without merit. First, the rebuttable presumption of waiver is "not overcome by an allegation that the petitioner did not personally (i.e., knowingly and understandingly) waive a ground for relief." David A. Scott III v. State, No. 01C01-9709-CR-00400, 1999 WL 233643, at \*3 (Tenn. Crim. App., Nashville, Apr. 20, 1999). Our supreme court has held that "[w]aiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." House v. State, 911 S.W.2d 705, 706 (Tenn. 1995). In so holding, the court emphasized the importance of the finality of convictions, stating,

"[t]here must be a finality to all litigation, criminal as well as civil. The courts, the executive branch of the government, the legal profession and the public have been seriously inconvenienced by the prosecutions of baseless habeas corpus and post-conviction proceedings. Defendants to criminal prosecutions, like parties to civil suits, should be bound by the judgments therein entered. When they fail to make a timely objection to errors of the courts they must not be allowed at later times of their own choosing . . . to assert those grounds in post-conviction actions."

Id. at 714 (citing Arthur v. State, 483 S.W.2d 95, 97 (Tenn. 1972)). As this Court stated in Blair v. State, 969 S.W.2d 423 (Tenn. Crim. App. 1997),

It appears clear that the legislature intended to restrict somewhat the ability of convicted criminals to collaterally attack their convictions. To a large extent, the availability and extent of post-conviction remedies lie within the discretion of the legislature.

As a result, many nonmeritorious petitions may be summarily dismissed if the trial court should decline to appoint counsel. There

exists the possibility that a pro se petitioner may have a meritorious claim dismissed because the petitioner was unable to communicate it effectively in his or her petition, thus extinguishing the claim forever. A petitioner may also miss asserting a valid claim that appointed counsel could discover through his or her expertise in the law. This may at times produce what may appear to be a harsh consequence resulting from the restrictions in the new Act. However, the legislature has established the guidelines for reviewing post-conviction cases.

Id. at 425.

We conclude that because the Defendant was bound by the actions of his attorney, the issue raised in his initial petition for post-conviction relief was waived. We also conclude that the Defendant failed to present any meritorious issues for the trial court's consideration in either his petition or motion to reconsider. Thus, we affirm both the trial court's denial of the Defendant's petition for post-conviction relief without appointment of counsel and its denial of the Defendant's motion to reconsider.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JERRY L. SMITH, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE